

**IN THE SUPREME COURT
STATE OF MISSOURI**

MICHAEL A. McCOY,)	
JOHN A. OAKS,)	
Appellants,)	
v.)	Case No. SC85498
)	
CALDWELL COUNTY, MISSOURI,)	
and CALDWELL COUNTY)	
SHERIFF KIRBY L. BRELSFORD,)	
Appellees.)	
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<hr style="border: 0.5px solid black;"/>)	

APPELLANTS' SUBSTITUTE REPLY BRIEF

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I. STATEMENT OF FACTS

As the Court is aware, the sole issue on appeal is whether the § 57.275 *RSMo. (2000)* hearing is a contested case and therefore subject to judicial review under the Missouri Administrative Procedures Act. Appellants contend that the hearing is adversarial and contains a level of procedural formality qualifying the hearing as a contested case under § 536.100. Respondents, in their brief, have alleged that the hearings are not adversarial proceedings and that the Administrative Procedures Act does not authorize the judicial review of the terminations in question because the Appellants were at-will employees who could be terminated with or without cause. In response, Appellants contend that Respondents' interpretation of § 57.275 renders the statute meaningless and that Respondents' reliance on *Cade v. State of Missouri* and *State ex rel. Mitchell v. Dalton* is misplaced.

As a matter of procedure, Appellants adopt by reference the statement of facts contained in their original brief. Appellants assert no additional facts in their reply brief.

II. POINTS RELIED UPON

The Circuit Court erred in dismissing the Petition for Judicial Review for lack of jurisdiction because the administrative hearing conducted pursuant to § 57.275 *RSMo. (2000)* is a “contested case,” as defined in § 536.010 *RSMo. (2000)*, in that such a hearing is adversarial in nature and is required by law, so that, the Circuit Court should have entertained the Petition for Judicial Review pursuant to § 536.100 *RSMo. (2000)*.

A. The interpretation of § 57.275 *RSMo. (2000)* adopted by the Circuit Court renders the statute meaningless 8

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STANDARD OF REVIEW

This Court reviews the Circuit Court’s findings of fact under a “clearly erroneous” standard, and in this case, Appellants do not contest any of the Circuit Court’s findings of fact. Issues involving statutory interpretation are purely questions of law, and this Court reviews the Circuit Court’s conclusions of law *de novo*. The issue before this Court is purely a question of law. *Delta Airlines, Inc. v. Director of Revenue*, 908 S.W.2d 353 (Mo. banc 1995).

III. ARGUMENT AND AUTHORITIES

A. The interpretation of § 57.275 *RSMo. (2000)* adopted by the Circuit Court renders the statute meaningless.

In their brief, Respondents argue that the trial court’s determination that the § 57.275 hearing was not a contested case was correct because the statutes do not require the procedural formalities generally found in adversarial proceedings to make the hearings granted to Appellants contested cases for the purpose of review under the Missouri Administrative Procedures Act. § 536.100. In support of their position, Respondents have narrowly construed the language of § 57.275 and § 57.015. Respondents claim that the strict language of the statute prevents the Appellants from participating in the hearing and that the Board is only a supervisory fact-finder. Respondents’ interpretation of the statute renders it meaningless.

It is well-settled under the rules of statutory interpretation that, if possible, a statute must be so construed as to give effect to the purposes for which it is enacted. *St. Louis v. Dorr, et al.* 146 Mo. 466; 46 S.W. 976 (Mo. banc 1898). It is always presumed that the Legislature must construe a statute to take effect and not to be a nullity. *Id.* When a literal following of the words of the statute will lead to an absurdity as to its consequences, that is sufficient authority to the interpreter to depart from them. *Id.* Thus, in enacting a new statute on the same subject as that of an existing statute, it is ordinarily the intent of the Legislature to effect some change in the existing law. *Kilbane v. Director of Department of Revenue*, 554 S.W.2d 9, 11 (Mo. banc 1976). If this were not so, the Legislature would be accomplishing nothing, and legislatures are not presumed to have intended a useless act. *Id.*

The Respondents' interpretation of § 57.275 and § 57.015 render the legislative enactment a useless act. Presumably, the Legislature was aware of the legal status of sheriff's deputies prior to enacting § 57.275. Before the statute was enacted, deputies were employed at the pleasure of the Sheriff. § 57.201(2) RSMo. (2000). In the absence of any expressed legislative intent, it must be assumed that the Legislature created this statute, and the hearing contained within it, to give terminated deputies a certain measure of procedural due process. In contrast to Respondents' claims, the Legislature must have intended to give aggrieved deputies something more than a simple notice hearing in which they are not even allowed to participate. The Legislature, under the rules of statutory interpretation, must have intended the statute to have a greater effect.

Respondents have also argued that the hearing is non-adversarial because § 57.015 does not allow the terminated deputy sheriff to participate in the hearing. Contrary to Respondents'

assertion, § 57.015 is silent regarding the deputy sheriff's ability to actively participate in the hearing. *Section 57.015* does not expressly prohibit the deputy's participation, but only limits the role of the Sheriff, the attorney for the Sheriff and the attorney for the aggrieved deputy. The Court must presume that the Legislature intended to allow the deputy an opportunity to speak out for his or her own interests. To suggest otherwise defies logic and common sense. If the deputy is not allowed to participate, then the hearing would be, in effect, a pro forma exercise of futility. Moreover, the lack of express language allowing participation of the deputy bolsters Appellants' argument that the Legislature must have intended more than the language found in § 57.015.

In addition, when the Legislature used the term "hearing," and it must also be assumed the Legislature was aware that a hearing under a common legal definition is considered to be adversarial in nature. *Section 536.010(2)* mandates that if a hearing is required by substantive law, it must be conducted according to contested case procedures. The courts have stated that the relevant inquiry is not whether the agency in fact held a contested case hearing, but whether it should have done so. *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325 (Mo. banc 1995). The Legislature, in defining the term "hearing" in § 57.015 had an opportunity to strictly define the hearing as non-adversarial, but chose not to do so. Instead, when the Legislature defined the term "hearing," it chose merely to curtail the role of the Sheriff, his attorney and the attorney for the aggrieved deputy. It did not intend, however, to curtail the rights of the deputies to a full adversarial hearing.

If the Court accepts the interpretation of § 57.275 put forth by Respondents and adopted by the Court below, then the statute effectively becomes meaningless. The Court must presume

more of the Legislature. The § 57.275 hearing clearly has elements of adversity in that the deputy sheriff has the opportunity to present evidence and to call witnesses in order to challenge the Sheriff's termination decision. Moreover, the Sheriff and the dismissed deputy are opposed to each other in these hearings, with opposing interests at stake. For these reasons, Appellants urge the Court to adopt a broader definition of the term "hearing," and to find that such hearings are adversarial, with a level of procedural formalities, thus making them contested cases.

B. Respondents' reliance on *City of Richmond Heights v. Board of Equalization of St. Louis County*, *Cade v. State of Missouri* and *State ex rel. Mitchell v. Dalton* and is misplaced.

In support of their argument that the § 57.275 hearing is not a contested case, Respondents rely heavily on this Court's holding in *City of Richmond Heights v. Board of Equalization of St. Louis County*, 586 S.W.2d (Mo. banc 1979). However, a thorough

analysis of the facts and circumstances surrounding the case finds that Respondents' reliance is misplaced.

Respondents correctly note in their substitute brief that this Court in the *City of Richmond Heights v. Board of Equalization of St. Louis County*, 586 S.W.2d (Mo. banc 1979), established the principles applicable in determining whether a hearing required by law qualifies as a contested case. In *City of Richmond Heights*, this Court specifically focused on the meaning of the word "hearing" in the definition of a contested case. However, the conclusions drawn by the Respondents are not supported by the Court's decision in the *City of Richmond Heights*.

The facts which led to the filing of the action in the *City of Richmond Heights* are distinguishable from the present case. The *City of Richmond Heights* case dealt with a municipality's request for judicial review of the St. Louis County's Board of Equalization's reduction of the assessed valuation of certain commercial property within the limits of the City Richmond Heights. The real estate in question had been previously assessed at approximately 2.7 million dollars. The property owners filed an appeal with the St. Louis Board of Equalization asking it to reduce the assessed value of that property. Consequently, the Board reduced the assessed value of the property to approximately 1.8 million dollars. As a result, the City of Richmond Heights lost a

substantial tax revenue due to this reduction in the assessed value.¹ The City of Richmond Heights then filed a petition for judicial review asking the Circuit Court of St. Louis County to review the decision of the Board pursuant to § 536.100 RSMo. (1978) claiming that the alleged hearing under § 138.102 RSMo. (1978) qualified as a contested case. In response, the Board of Equalization filed a motion to dismiss asserting that the City of Richmond Heights lacked standing to bring its Petition for Judicial Review. The trial court sustained the motion to dismiss and an appeal to this Court followed.

Among several issues decided by this Court in *City of Richmond Heights*, the only issue relevant to the present inquiry is whether the hearing under § 138.102 RSMo. (1978) qualified as a contested case. Section 138.102 required that the St. Louis County Board of Equalization meet monthly “for the purpose of *hearing* allegations of erroneous statements. (Emphasis added). In bringing its Petition for Judicial Review, the City stressed the use of the term “hearing” in §

138.102, and contended that its use brought the Board of Equalization proceedings within the definition of a contested case found in § 536.010(3). This Court determining that the hearing was not a contested case under § 536.100, held the meaning of the term “hearing” in a particular case is to be determined by the character of its use either as a participle or a noun. 39A C.J.S. Hear, Page 632, citing *State ex. Case v. Sehorn*, 238 Mo. 508, 528-29, 223 S.W. 664, 670 Banc (1920). This Court further held that when the term “hearing” is used as a noun, as it is in the definition of “contested case” in § 536.010(3) the term carries with it a presumption that such a proceeding is before a competent tribunal for trial of the issues between adversarial parties, in which evidence is presented and arguments are considered, and determinative action is taken by the tribunal with respect to the issues. The term “hearing,” when used as a noun, also requires that the parties test, examine, explain and refute evidence, and contemplates an opportunity to be heard, not only the privilege to be present when the matter is considered, but the right to present one's contentions and to support the same by proof and argument. The *City of Richmond Heights* Court held that there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute the evidence.

The *City of Richmond Heights* case is clearly distinguishable from the present case, and therefore Respondents' reliance upon it is misplaced. First, the word “hearing” in the context of § 57.275 is used as a noun implying a level of procedural formality. In contrast, the term “hearing” in the *City of Richmond Heights* case is used as a participle, only requiring that the Board listen to allegations of erroneous tax evaluations. The *City of Richmond Heights* Court specifically found the term's use within the statute did not envision a formal hearing.

Secondly, the notice provisions in each statute are inherently different. Under § 57.2 the aggrieved deputies under § 57.275 are provided with written notice detailing the exact reasons for the Sheriff's decision to terminate their employment. Providing the deputies with information prior to the hearing gives them an opportunity to gather evidence and dispute the reasons for their terminations at the formal hearing which can be requested after the notice is received. In contrast, the Appellants, under § 138.102, were not given any written notice of the reasons for the reduction in the assessed value of the property, nor were they given notice that the value of the property had been reduced in the first place. *Section 138.102* did not require a notice whatsoever. As previously noted, the Court's finding that the hearing was not a contest case, was based primarily on the lack of prior notification to the parties.

The foregoing demonstrates that the facts of the two cases, as well as the statutes upon which the appeals are based are inherently different, and thus the holding in the *City of Richmond Heights* does not lend support to Respondents' contentions.

Respondents also rely heavily on this Court's holding in *Cade*. In *Cade*, the Appellant filed an appeal through the internal grievance procedure of the Missouri Department of Social Services, Division of Family Services challenging his four-day suspension for failing to wear a necktie at work. After both parties processed the grievance through the preliminary steps of the grievance procedure, the Director of DFS assembled a grievance panel pursuant to that procedure. In *Cade*, the aggrieved employee was granted a hearing pursuant to the procedures which were promulgated by DFS in

accordance with *1 C.S.R. 20-4.020(2)*. This regulation requires only that grievances be resolved quickly and informally, and does not mandate any hearings.²

As the Court can readily see, the regulation in *Cade* merely directs the DFS to create a system by which grievances are handled informally. It contains no legal requirement for a hearing, nor any other procedural formalities. Unlike the provisions of § 57.275 and § 57.015 the language found in *1 C.S.R. 20-4.020* does not call for the administrative agency to conduct a formal hearing with any type of procedural formality to review intra-departmental grievances. The decision whether to grant a hearing is left to the discretion of the administrative agency. The regulation only requires that the administrative body create an informal system by which differences between management and employees are settled through an orderly grievance procedure, and does not prescribe the procedures to be followed as a means to resolve grievances.

In contrast, § 57.275 requires a formal hearing which mandates that the Sheriff appoint a hearing board to act as a fact-finder. The statute also requires a certain level of procedural formality including providing the aggrieved deputy with the ability to present evidence and call witnesses, allowing the deputy to offer testimony disputing the Sheriff's grounds for termination and presenting evidence rebutting the testimony of adverse witnesses. The Sheriff is required by law to follow these procedural steps, in direct contrast to the provisions of *1 C.S.R. 20-4.020*, which mandates no such formalities. Given these inherent differences, this case is clearly distinguishable from *Cade*, and Appellants urge the Court not to rely on the *Cade* opinion in deciding this appeal.

Respondents also rely on *State ex rel. Mitchell v. Dalton*, 831 S.W.2d, 942 (Mo. App.E.1 1992). The *Mitchell* case is no more applicable than the *Cade* case. In *Mitchell*, the Appellant was convicted of manslaughter and was eligible for parole after serving a portion of his sentence.

After reviewing the Appellant's case, the review panel, as created by *14 C.S.R. 80-2.010*, declined to grant him parole. The Appellant responded by filing a petition in circuit court to review the review panel's decision, then appealed the denial of that review. In its opinion, the Eastern District Court of Appeals stated that the parole board is granted the discretion to release an offender on parole when, in its opinion, there is a reasonable probability that the offender can be released without detriment to the community or himself. *Id.* at 944.

Unlike the hearing board as created by § 57.275, the parole board, in effect, only represents society and determines what is in society's best interest. *Id.* at 944. Moreover, an appearance before the parole board is referred to in the statute as an "interview," so that the proceeding is akin to a discussion of the offender's progress toward rehabilitation and the reasons why parole should or should not be granted. Thus, the panel's relationship to the offender is supervisory in nature and not adversarial. Appellants contend that this case has no applicability to the current case. *14 C.S.R. 80-2.010* contemplates an open discussion between the parolee and the parole board. The parolee

bears the burden to show that he has met the requirements for parole and is not a danger to society. *Id.* at 944.

In contrast, § 57.275 requires that the board hear the evidence regarding the Deputies' discharge and submit factual findings to the Sheriff based on the information presented. The § 57.275 board, unlike the parole board, is a neutral fact-finder that is required to make a factual determination. The parole board, in representing society, must take into account society's best interest and make a decision as to whether or not to grant parole. This is completely different

from the present case. For these reasons, the holding in the *Mitchell* case provides no support for the Respondents' arguments.

C. Respondents' argument regarding the employment at-will doctrine cannot be reconciled with the provisions of § 57.275 and § 57.015.

In their brief, Respondents assert that Appellants are not entitled to have their terminations reviewed as a non-contested case under § 36.100 of the M.A.P.A., because of their status as at-will employees. In support of their argument, Respondents point to the language in § 57.275 which states that deputy sheriff's status as at-will employees are not affected by that section. However, it is evident that the statute contains conflicting provisions, and Respondent interpretation would again render the statute meaningless, just as Respondents' argument regarding whether the hearings in question are contested cases. The interpretation of § 57.275 and § 57.015 is purely a question of law, and

presents an issue of first impression in this Court, since no other appellate decisions involve an interpretation of these statutes.

As Respondents correctly point out, the decision in *Mosley v. Members of the Civil Service Board for the City of Berkeley*, 23 S.W.3d 855 (Mo. App. E.D. 2000), reiterated the general rule that the terminations of public employees who have at-will status represent agency decisions which are not reviewable as non-contested cases under § 36.100 of the M.A.P.A.. However, the court in *Mosley* was not faced with a hearing requirement such as the one at issue in this case, making that decision wholly inapplicable to the case at bar. Instead, Appellants urged the Court

to allow judicial review of these terminations as non-contested cases, as an alternative argument to their primary position that these hearings are contested cases.

For purposes of this discussion, § 57.275 and § 57.015 contain three operative provisions. First, § 57.015(1) defines a deputy sheriff as a non-probationary officer. Second, § 57.275 grants deputy sheriffs the right to a hearing upon termination. Third, § 57.275(2) states that the at-will status of deputies is not affected by the statute. Thus, it is clear that giving effect to the third operative provision would render meaningless the first two operative provisions.

Interestingly, the court in *Mosley, Id.* pointed out that the employee was considered to be on probationary status as a matter of law, so that she was an employee at will who could be terminated with or without cause. Here, § 57.015(1) clearly differentiates between probationary officers and deputy sheriffs who have become “tenured” with the employer. Under Responder interpretation, there would be no practical difference between probationary deputies and tenured deputies, because both classes would be terminable at-will, with or without cause. Again, such an interpretation would render the hearing under § 57.275 a meaningless, pro forma exercise in futility. Appellants urge the Court not to adopt an interpretation that would effectively destroy the intent of the Legislature.

Instead, Appellants offer an interpretation of the statutes whereby tenured deputy sheriffs who are terminated may seek judicial review of that decision as a non-contested case. The Legislature must have intended to bestow a measure of due process with this enactment, thereby creating a separate class of employee other than probationary officers who have only at-will status. While Appellants maintain their primary position that such hearings are contested cases, they urge this alternative position in order to bring substantive effect to the statutory provision.

at issue. Thus, at the very least, the Court should reverse the Circuit Court, and remand the matter for a *de novo* hearing consistent with the provisions of § 36.100 of the M.A.P.A.

IV. CONCLUSION

In their opening brief and in this reply, Appellants argue that the “hearing” described in § 57.275 is a contested case, because such hearings are adversarial in nature and require adherence to a certain level of procedural formality. Thus, decisions to terminate deputy sheriffs are subject to judicial review under § 36.100 of the M.A.P.A.

Any other interpretation of the statute would render such hearings a meaningless, pro forma exercise in futility.

In the alternative, Appellants argue that deputy sheriffs are not simply at-will employees for purposes of judicial review under § 36.100 of the M.A.P.A., and that any contrary interpretation would completely strip the statute of any practical effect.

For the foregoing reasons, Appellants urge the Court to reverse the order of dismissal of the Circuit Court and remand the matter for further proceedings as discussed herein.

submitted, _____Respectfully

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellants' Substitute Reply Brief was delivered via U.S. Mail, first-class postage prepaid, this 31st day of December, 2003, addressed as follows:

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CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Missouri Rule of Civil Procedure 84.06(c) certifies that the foregoing Appellants' Substitute Reply Brief complies with the limitations set forth in Missouri Rule of Civil Procedure 84.06(b), and that:

1. The Brief contains 4,515 words per the word count of the word processing system;
2. The Brief was prepared with Word Perfect 9.

CERTIFICATE OF VIRUS FREE DISK

The undersigned, pursuant to Missouri Rule of Civil Procedure 84.06(g), certifies that the disk containing the Appellants' Substitute Reply Brief, which was mailed to counsel for Appellees and filed with the clerk of the Court, was scanned for viruses and is virus-free.

Séan P. McCauley #52483

¹The reduction of the assessed value causing the property value to drop reduced the tax valuation of the property reducing the real estate owner's potential tax liability. This reassessment cost the City approximately \$6,000.00.

² Appellants have attached, for the Court's review, a full copy of *1 C.S.R. 20-4.020 2002*. (See Appendix 1).

